ASSOCIATED PAN MALAYSIA CEMENT SDN. BHD.

v.

SYKT. TEKNIKAL & KEJURUTERAAN SDN. BHD.

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
MOHD. YUSOFF MOHAMED SCJ
GUNN CHIT TUAN SCJ
[CIVIL APPEAL NO. 02-99 OF 1990]
23 AUGUST 1990

CONTRACT: *Whether time of the essence - Condition - Whether respondent's termination constituted breach of contract - Estoppel - Assessment of damages - Section 64 Contracts Act 1964.*

TORT: *Damages - Breach of contract - Question of remoteness and nexus.*

CIVIL PROCEDURE: *Whether defendant needs to specifically claim damages - Order 18 r. 13(4) Rules of the High Court 1980.*

The appellant AP (owner of a quarry and a cement manufacturing factory) and the respondent TK (a contractor for quarrying works) entered into three contracts for quarrying and for the construction of haul roads from the quarry to the crushing plant; for a period of six months after expiration of the first contract there was no written agreement signed by the parties. TK claimed damages for breach of contract (under various categories); some of the claims were for periods which were not covered by the contracts. As a result of these disputes, TK terminated the work under Clauses 19.2 and 19.3 of the third contract. AP denied all those claims and pleaded defences of waiver and lack of stipulation in the third contract that time was to be of the essence. TK succeeded in the trial Court; hence this appeal by AP.

The main issues were firstly whether time was not of the essence in any of the contracts in question; secondly whether TK's termination was itself a breach of contract, thirdly even if the appellant had breached the contract whether the breaches had been waived by the respondent and lastly whether the assessment of damages by the trial Court was correct.

Held:

[1] (a) The provisions and nature of the contract, its subject matter and the surrounding circumstances showed that payment and therefore time, was of the essence.

(b) Applying the tests suggested by LJ sellers and LJ Upjohn in the *Hongkong Fir Shipping* case, it was the intention of the parties by necessary implication that the stipulation on (Clause 7.1) was to be regarded as a condition which goes to the root of a contract.

(c) Whether the stipulation concerned was a condition or not did not matter because the parties have expressly provided for the consequences of a breach thereof and the learned Judge had given effect to the parties intention.

[2] Section 64 of the Contracts Act 1950, which was not brought to the attention of the learned Judge represents a departure from the common law in England; section 64 is similar to the Indian law on the general principles of waiver under which it is open to a promisee to

dispense with or remit wholly or in part the performance of the promise made to him or he can accept any promise which he thinks fits; under Malaysian law neither consideration nor an agreement is necessary. As a matter of fact, waiver did not apply in this case.

[3] As the issue of estoppel was not specifically pleaded in the statement of defence nor raised by the appellant in the lower Court, AP could not raise it at the appellate stage.

[4] Although AP did not raise a positive allegation of the question of remoteness of damage, para. 23 of the statement of defence denied each allegation in the statement of claim; although the prevailing and better practice is for the defendant to deal specifically with the claim for damages yet there is no obligation on AP, as defendant, to plead to the allegations as to damages because O. 18 r. 13(4) of the Rules of the High Court 1980 covers this question.

[5] (a) On the evidence, all the awards, excepts for two, should be allowed.

(b) The payments for alleged loss due to termination and retrenchment payment and benefits and the payment to the leasing company for repossession of the machines were too remote and did not have a nexus to the termination of the contract in question.

(c) The award for general damages was wrong as the respondent was not the owner of the machines and was merely the lessee; consequently the respondent could not claim for the loss of the value of those goods in respect of which it had no title.

[6] The question of deduction of income tax was not raised at all by either party as to the liability of TK to pay tax, or the amount of its tax liability; therefore further deductions for tax could not be made.

[Order accordingly.]

Cases referred to:
Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd. [1962] 2 QB 26
Tan Ah Kian v. Hj. Hasnan [1962] 28 MLJ 400
Chin Kim & Anor. v. Loh Boon Siew [1970] 1 MLJ 197
Panchaud Freres S.A. v. Establishments General Grain Company [1970] 1 Lloyd's Rep 53
Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. [1949] 2 KB 528
Koufos v. C. Czarnikow Ltd. [1969] 1 AC 350
Daishowa (M) Wood Products Sdn. Bhd. v. Kepong Wood Products Co. Sdn. Bhd. [1980] 2 MLJ 68
De Bussche v. Alt [1877] 8 Ch D 286
Proctor and Gamble v. Peter Cremer [1988] (3) All ER 843
Societe Italo-Belge v. Palm and Vegetable Oils (Malaysia) Sdn. Bhd. [1982] 1 All ER 19
Wickman Tools v. Schuler A.G. [1974] AC 235
Sargent v. A.S.L. Developments Ltd. [1974] 131, CLR 634
Habib Bank Ltd. v. Habib A.G. [1981] 1 WLR 1265
Chuna Mal-Ram Nath v. Mool Chand-Ram Bhagat LR 55 IA 154
Prenn v. Simmonds [1971] 1 WLR 1381

Legislation referred to:
Contracts Act 1950, ss. 40, 64, 74
Contract Act [Ind], s. 63
Limitation Act 1953, s. 4
Rules of the High Court 1980, O. 18 r. 8(1), O. 18 r. 13(4)

For the appellant - G Sri Ram, Chin Yew Meng & Khalid Mohamed; M/s. Allen & Gledhill
For the respondent - R.R. Sethu & M.S. Murthi; M/s. Murthi & Partners

JUDGMENT

Gunn Chit Tuan SCJ:

The appellant, Associated Pan Malaysia Sdn. Bhd., owner of a quarry as well as a cement manufacturing factory, appealed against the decision of Anuar J in the High Court at Kuala Lumpur on 9 March 1990, in favour of the respondent, Syarikat Teknikal and Kejuruteraan Sdn. Bhd., a contractor for quarrying works.

The claim by the respondent was for damages for breach of contracts. There were three agreements entered into between the appellant and the respondent. The first contract for the period from 3 September 1979 to 31 December 1980, was for quarrying works. The respondent was also to carry out operations of constructing haul roads from the quarry to the crushing plant.

For a period of six months after the expiration of the first contract there was no written agreement signed by the parties but the respondent carried on with the quarrying works on terms set out in the first contract.

The second contract was from 1 July 1981 to 30 June 1983, and the third contract was from 1 July 1983 to 30 June 1985. That third contract was extended for another year with effect from 1 July 1985 to 30 June 1986 (see letter dated 4 June 1985).

The appellant was dissatisfied with the decision of the learned Judge and appealed against the whole of his decision on the grounds set out in the memorandum of appeal.

In order to appreciate the nature and extent of the claim it is useful to summarise them as follows:

(1) ***Claims for the months of September, October and November 1980 (para. 10 of the statement of claim)***

The respondent alleged breach of promise by the appellant for failing or refusing to supply explosives for the blasting of rocks during those months.

The particulars of loss are founded on the basis of minimum requirements by the appellant of 110,000 tonnes at an agreed price of RM410 per tonne and also on the basis of a margin of profit based at 32% of gross income making a total loss of RM379,551.16.

(2) ***Claims for the months of March, April, May and June, 1981 (para. 12 of the statement of claim)***

The respondent alleged that due to (a) breakdown of the appellant's rock blasting plant; (b) the appellant's delay in the completing of its new cement manufacturing plant' and (c) the appellant's failure to dewater the quarry, the respondent was prevented from loading the required minimum of 80,000 tonnes thereby incurring a loss of RM521,805.92.

It should be observed that those three months are not covered by any written agreement.

(3) ***Claim for period 1 January 1981 to 31 March 1982 (para. 14 of the statement of claim)***

A claim founded on the allegation that by reason of the appellant's neglect or refusal to dewater the quarry there was loss on account of (a) rental of machinery to replace the respondent's damaged machinery; (b) purchase of tyres to replace damaged tyres; and (c) purchase of spare parts for the respondent's machinery.

It is also to be noted that under this head the period between 1 January 1981 to 30 June 1981 was not covered by any written agreement.

(4) *Claim for August 1984 to June 1985 - during the third contract (para. 15 of the statement of claim)*

The respondent alleged that the appellant breached the agreement (a) in neglecting or refusal to dewater and (b) for failing to construct and maintain roads for the respondent's loaders and haulers.

The respondent also alleged that during this period the appellant's crushing plant had frequent breakdowns.

The third head of the claim may be divided into three categories of claim:

(a) *For the period 1 November 1984 to 31 March 1985 (para. 16 of the statement of claim) (letter of 2 November 1984)*

It was alleged that the appellant agreed to pay for a minimum of 7,000 tonnes of rocks per day for those months but due to reasons given in para. 15 of the statement of claim the appellant had prevented the respondent from achieving the required tonnage and thereby incurred a loss in the form of shortfall the particulars of which were set out in para. 16 of the statement of claim;

(b) *Claim for the months of April, May and June, 1985 (para. 17 of the statement of claim) (letter of 1 April 1985)*

This claim was again founded on the allegation that the appellant agreed to pay for a minimum of 200,000 tonnes of rocks for the three months but on grounds set out in para. 15 of the statement of claim the appellant had prevented the plaintiff from achieving the required minimum whereby it suffered loss particulars of which were given in para. 17 of the statement of claim.

(c) *Claim for the months of August 1984 to May 1985 (para. 18 of the statement of claim)*

The respondent alleged that for reasons stated in para. 15 of the statement of claim the respondent had suffered loss for the rental of machinery, the purchase of tyres and purchase of spare parts particulars of which are set out in para. 18 of the statement of claim.

(5) *Claim under para. 22 of the statement of claim*

Under this head, the respondent alleged (a) under the terms of the third contract the payments were to be made by the 10th working day of each succeeding month (para. 19 of the statement of claim) and (b) repeated written and verbal protests were made by the respondent. The respondent further alleged that the appellant breached the agreement by habitually and consistently delaying payments for the entire period from July 1983 to August 1985 and (c) on 28 August 1985 the respondent terminated the work under Clause 19.2 of the third contract, which *inter alia*, stated that each party may terminate the agreement with four months notice in writing and Clause 19.3 provides that any termination shall be without prejudice to any claim or action either party may have against the other in respect of any antecedents reached of the terms mentioned.

The respondent alleged that arising from the appellant's breach of the third agreement he had suffered the following losses:

a) loss of profit for 9 months unexpired period (presumably covered the period of the extension of the third contract) (particulars are set out in Schedule "A" of the statement of claim);

b) for the termination and retrenchment particulars are in Schedule "B" of the statement of claim; and

c) payments to the leasing company for repossession of the respondent's machinery (particulars in Schedule "C" of the statement of claim).

(6) ***Claim for the months of November 1984 to May 1985 (para. 23 of the statement of claim)***

A claim by the respondent that the appellant wrongfully deducted from payments due to the respondent a sum of RM123,733.77 as hiring charges for the appellant's track excavators used by the appellant.

(7) ***Claim for the months of 2 August 1985 to 2 September 1985***

This was a claim by the respondent that the appellant had wrongfully deducted from the respondent's invoices dated 2 August 1985 to 2 September 1985 the price for rocks hauled by the respondent for the sums of RM36,022.81 and RM320,547.63 respectively.

The respondent also claimed general damages for loss of machinery.

In its amended statement of defence and amended counter-claim the appellant not only denied the respondent's claims in paras. 10, 12, 14, 16, 17, 18, 22, 23 and 24 of the respondent's statement of claim, but also pleaded two general defences. The first was the defence of waiver whilst the other general defence was that there was no stipulation in the last agreement that time was to be the essence of contract and accordingly the respondent by terminating the agreement was in breach of it.

After 24 days of trial during which the learned Judge saw and heard the witnesses on both sides and having examined the voluminous documents running into over 3000 pages of letters, reports, plans and invoices tendered, the learned Judge found that the respondent had on the balance of probabilities established its claim in the said paragraphs of its statement of claim. He found that there was no evidence adduced by the appellant that it was induced to enter into further agreements by any representation, forbearance or inducement made by the respondent, and further considered that the defence of waiver was an afterthought to buttress an otherwise weak defence.

As regards the other general defence the learned Judge was of the view that it was not open to the appellant to rely on it to defeat the contractual rights of the respondent under the agreement to terminate it for breach of contract. In the event he held that the notice of termination was valid and binding, and therefore allowed the respondent's claims against the appellant and awarded damages as prayed for in the statement of claim with interest and costs. He also dismissed the appellant's counter-claim with costs.

Before us, it was the contention of Mr. G Sri Ram, leading Counsel for the appellant, that time was not of the essence of any of the contracts in question. He pointed out that the respondent terminated the contract dated 8 August 1983, as extended by a letter dated 28 August 1985 (Vol. 11 of the appeal records at p. 3051) on the grounds (a) that the appellant was in breach of the said extended contract in that payments had been made out of time; and (b) that the appellant had wrongfully deducted and withheld monies due to the respondent.

Counsel stated that in the Court below the issues were (i) whether the respondent's termination of the said extended contract was justified or amounted to a wrongful repudiation and therefore a breach of contract; (ii) whether the appellant had been guilty of breaches of contract in respect of each of the periods concerned; and (iii) if the appellant was in breach of contract as aforesaid then, whether such breach or breaches had been waived by the respondent as pleaded in para. 22 of the amended defence (Vol. I of the appeal records at p. 38). Counsel stated that the above issues also arise in the appeal before us. There is an additional issue that arises in this appeal in respect of quantum, that is, whether the formula adopted and applied by the learned Judge in assessing damages and the quantum awarded by him are under admissible heads and whether the same is reasonable having regard to the remoteness and measure of such damages and the tax element.

It was submitted for the appellant that the grounds relied upon by the respondent for terminating the said extended contract were without substance because, in respect of late payments, time was not and had not been made of the essence, and in respect of the deductions they were entirely proper. He stated that it was not open for the respondent to contend that the appellant had thrown out the contract because there was no refusal on the part of the appellant to continue performance. Further there was nothing in the appellant's conduct to suggest that it no longer intended to be bound by the contract. He contended that the respondent was therefore not entitled to bring the contract to an end by terminating it. The purported termination was accordingly without lawful justification and constituted a wrongful repudiation. Counsel also contended that if there had been any breaches by the appellant they were all waived by the respondent. Counsel claimed that by reason of all the circumstances of the case and upon a proper application of the relevant law to those circumstances the respondent was not entitled to any relief whilst the appellant was entitled to judgment on its counter-claim. Counsel also contended that if the appellant is liable then the quantum awarded by the learned Judge is excessive and unreasonable and suffers from errors in points of principle.

Counsel suggested that there are two approaches to determine the rights of an 'innocent' party where a breach of contract is either admitted or found to exist. The first approach is to ascertain the importance of the broken stipulation. Thus if the term in question is, when objectively viewed, an important one (called a condition or fundamental term) its breach would give the 'innocent' party the right to put an end to the whole contract and to sue for damages for its breach. If the term is, when objectively viewed, one that is relatively unimportant (called a warranty) then its breach would give rise only to an action in damages. Counsel then referred to the following passages in the judgment of Lord Justice Sellers and Lord Justice Upjohn respectively in *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.* [1962] 2 QB 26, at p. 60, 63-64:

> The formula for deciding whether a stipulation is a condition or a warranty is well recognised, the difficulty is in its application. It is put in a practical way by Bowen LJ in *Bentsen v. Taylor, Sons & Co.* [1893] 2 QB 274, 281, 9 TLR 552 CA: "There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warrant sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability. and"
>
> It is open to the parties to a contract to make it clear either expressly or by necessary implication that a particular stipulation is to be regarded as a condition which goes to the root of the contract, so that it is clear that the parties contemplate that any breach of it

entitles the other party at once to treat the contract as at an end. That matter has to be determined as a question of the proper interpretation of the contract. Bramwell B. in *Tarrabochia v. Hickie* [1893] 2 QB 274, 281, 9 TLR 552 CA has warned against the dangers of too ready an implication of such a condition. He said: "No doubt it is competent for the parties, if they think fit, to declare in express terms that any matter shall be a condition precedent, but when they have not so expressed themselves, it is necessary for those who construe the instrument to see whether they intended to do it. Since, however, they could have done it, those who construe the instrument should be chary in doing for them that which they might, but have not done for themselves." Where, however, upon the true construction of the contract, the parties have not made a particular stipulation a condition, it would in my judgment be unsound and misleading to conclude that, being a warranty, damages are necessarily a sufficient remedy.

The second approach, according to Mr. Sri Ram is to examine the consequences of the alleged breach. Thus if the breach in question is so serious as to go to the root of the contract, then repudiation and damages may be exercised and claimed. If the breach is minor and thus does not affect the sub-stratum of the contract then the right exercisable is a claim sounding in damages with no right of repudiation. Counsel stated further that if the guilty party is in breach of contract, the innocent party may elect either to accept the breach, treat the contract as at end if the term broken is a condition and forthwith sue for damages. On the other hand he may acquiesce in the breach and treat the contract as continuing. If he elects to take this course of action, the innocent party is then barred from pursuing any remedy. The extinguishment of the right to sue may be grounded on affirmation, acquiescence, waiver or estoppel. Counsel contended that it matters not which of these expressions is used for they are all species of a common genus, namely, the doctrine of estoppel.

Counsel then contended that the learned Judge should have considered whether the respondent was justified in terminating the extended third contract. He pointed out that the letter of termination (Vol. 11 of the appeal records at p. 3051) gave two reasons. As regards the first reason, namely late payments, he stated that the respondent's case was that *ab initio*, the time clause was honoured more by breach than observance. He then referred to the learned Judge's conclusion on the issue as to whether the termination was justified and submitted that the conclusion of the learned Judge was wrong because the statement of law that time not being of the essence will not defeat a claim for damages for breach of contract is not correct and contrary to authority. He contended that time to be of the essence is not only germane to a party seeking the remedy of specific performance only as stated by the learned Judge, and also that for time to be of the essence notice must be given; otherwise there would be no breach. He contended that to terminate the contract in the circumstances of this case was wrongful repudiation. Counsel then referred to *Tan Ah Kian v. Hj. Hasnan* [1962] 28 MLJ 400, 402 which was a case concerning a sub contract for work and materials to lay roads and stated that the Courts in this country do not treat time to be of the essence in this type of cases. It was therefore his contention that since time was not of the essence in this case it is not a condition, the breach of which would entitle the innocent party to repudiate.

Counsel also contended that the contemporaneous documentary evidence and the conduct of the parties towards each other during the tenure of their relationship *vis-a-vis* the time stipulation supports the conclusion that the parties did not consider it to be an important term. In any event he contended that the evidence showed that the respondent had affirmed or acquiescenced in the making of late payments and can no longer rely upon it as a cause to ground termination.

As regards the second reason given, namely, wrongful deductions, Counsel pointed out that it was in respect of two periods namely (a) October 1984 - May 1985 i.e. during the subsistence of the third contract and (b) August 1985 - September 1985 i.e. during the extension of the third contract. Counsel stated that the evidence, both oral and documentary, shows that the appellant made advance payments and supplied goods and machinery to the respondent at his request. The charges in respect of such supplies were consequently deductions which the appellant was entitled to make. It was contended that the totality of the evidence supports a conclusion of waiver or acquiescence on the respondent's part which therefore did not afford justification for termination of contract.

On the issue as to whether the termination of contract was justified, Counsel concluded by submitting that the learned Judge had failed to test the respondent's evidence against the totality of the contemporaneous documents. He contended that the failure constituted a serious misdirection which had occasioned a miscarriage of justice. Moreover a consideration of the whole of the evidence showed that the respondent had waived his rights by electing to affirm each alleged breach and there was therefore no lawful justification for the termination of contract.

On the other issues raised, Mr. Sri Ram contended that it was not open to the respondent to make any claim in respect of matters in the past by reason of waiver, election or acquiescene. He referred to the relevant passages in the learned Judge's judgment and contended that the learned Judge had misdirected himself on the issue of waiver. He stated that the learned Judge was looking for a dispensation of a promise by the promisee, and contended that was not the context in which the term 'waiver' is applicable or is to be used in this case. Counsel stated that the 'waiver' applicable here is in the sense that any wrong by way of a failure to perform has been affirmed by conduct so that the respondent is estopped from contending that there has been a breach of an obligation. He pointed out that in English law waiver requires an agreement and consideration; but our law does not because it is governed by s. 64 of the Contracts Act 1950. He then referred to *Chin Kim & Anor. v. Loh Boon Siew* [1970] 1 MLJ 197, 198 in which case reference was made to s. 40 of our Contracts Act concerning the effect of refusal of a party to perform a promise wholly and where the former Federal Court had explained the meaning of the expression "unless he has signified by words or conduct his acquiescence in its continuance" appearing therein. He also referred to a passage in the judgment of Lord Justice Winn in the U.K. Court of Appeal case of *Panchaud Freres S.A. v. Establishments General Grain Company* [1970] 1 Lloyd's LR 53, 60:

> There is a very good discussion of waiver in *Chitty on Contracts*, 23rd Edn., General Principles volume, at para. 1241 and the following paragraphs. I do not take time to quote from those paragraphs; it is quite clear on referring to them that the learned authors treat, and I think rightly treat, "waiver" as derived either from agreement or from a quasi estoppel. In my own judgment it does not seem possible in this case to say affirmatively that there was here either a fresh agreement, to rescind or vary the original contract, or anything which, within the scope of the doctrine as hitherto enunciated, could be described as an estoppel or a quasi estoppel. I respectfully agree with my Lord that what one has here is something perhaps in our law not yet wholly developed as a separate doctrine - which is more in the nature of a requirement of fair conduct - a criterion of what is fair conduct between the parties. There may be an inchoate doctrine stemming from the manifest convenience of consistency in pragmatic affairs, negativing any liberty to blow hot and cold in commercial conduct.

Mr. Sri Ram therefore contended that in the context of the long relationship between the parties it was a fair inference that the respondent had given up its rights to terminate the contract on the grounds stated and submitted that the respondent was not entitled to blow

hot and cold in its conduct. He contended that the principle of law stated by the learned Judge constituted a misdirection on the law applicable to the subject at hand which entitled the appellant to have the judgment set aside.

On the question of damages, Mr. Sri Ram submitted that assuming that the respondent was justified in terminating the extended contract, then ensuing damage cannot encompass previous losses. Moreover the losses *de futuro* cannot in this case comprise damage falling outside the provisions of s. 74 of the Contracts Act 1950, because the damage is too remote and irrecoverable. He also contended that the awards of alleged losses in the past and loss in respect of termination and retrenchment payments and benefits paid to employees and also payment to the leasing company for repossession of machines were wrong in principle.

It was also contended that the measure of damages for loss of profits is also excessive by reason of the respondent's own evidence or the lack of it. Counsel pointed out that for the two years for which accounts were produced, i.e. 1979 and 1980 losses were shown. He also pointed out that the respondent did not produce audited accounts for the relevant years nor were tax returns produced. Counsel contended that if the learned Judge was right in awarding damages at all, then he ought to have provided for the incidence of tax.

On the award for loss of machinery (para. 22 (iii) of the statement of claim) Counsel stated that the learned Judge awarded RM7,968,452.80. The respondent had also claimed general damages for loss of the machines and the learned Judge awarded RM6,000,000 under that head. Counsel submitted both those awards were inadmissible. As regards the award of RM7,968,452.80, Mr. Sri Ram stated that the learned Judge was wrong in his finding that there was no serious challenge. He stated that there was in fact a serious challenge on that issue, and pointed out that the respondent had use, enjoyment and possession of those machines prior to 20 October 1982, when the lease was with Borneo Tractors. Counsel contended that on the evidence it was fair inference that it was the respondent's inability to pay under the leases that led to the repossession of the machinery and it had therefore no nexus with the grounds for termination. Moreover it was an error in principle in point of remoteness to make any award under those circumstances.

As regards the award of RM6,000,000 Counsel contended that that head of damage was wholly inadmissible and the learned Judge ought not to have countenanced it. He pointed out that the respondent was not the owner of the machines. It was merely the lessee and was entitled to the use and possession of the machines provided that rent was paid. Since it had no ownership rights it could not claim for the loss of the value of goods in respect of which it had no title to. By reason of the foregoing Counsel submitted that the award of RM13,968,452.80 should be set aside.

Mr. Sri Ram also contended that the learned Judge was wrong in making an award of RM1,155,865 as claimed by the respondent in para. 14 of his statement of claim for losses alleged to have been suffered by the respondent due to the appellant's neglect or refusal to dewater the quarry throughout the period 1 January 1981 to 31 March 1982. He also stated that the learned Judge was wrong in making the award of RM1,705,106.04 as claimed by the respondent in para. 18 of its statement of claim for the period from August 1984 until June 1985 because of the appellant's breach of their agreement for having neglected or refused to dewater the quarry and to construct and maintain roads for the respondent's loaders and haulers. Counsel stated that the evidence did not warrant the making of such awards because part of the claim relate to replacement of materials damaged by ordinary wear and tear for which the appellant could not be held liable. Moreover there was no intimation of such claims

at the material time so that the appellant was entitled to assume that there were no such claims or that they had been abandoned. For remoteness of damage reliance was placed on s. 74 of the Contracts Act and on *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* [1949] 2 KB 528 (at B.282-283), *Koufos v. C. Czarnikow Ltd.* [1969] 1 AC 350 (at 337-338) and on the incidence of taxation Counsel referred to *Daishowa (M) Wood Products Sdn. Bhd. v. Kepong Wood Products Co. Sdn. Bhd.* [1980] 2 MLJ 68 (at B.372 and 373-374).

On the question of liability, Mr. R.R. Sethu, leading Counsel for respondent, submitted that whether the respondent was entitled to terminate the contract for the breach in question i.e. the late payments, is a question of construction of the relevant document. He submitted that the respondent was entitled to do so in this case because the late payments were not only established by evidence but also freely admitted by the appellant. Counsel also referred to the *Hongkong Fir Shipping* case (*supra*) and pointed out that in that case the parties had not specifically provided for termination and there was no termination clause in the charter party involved in that case. He stated that Clause 19.2 of the contract in this case (Vol. 3 of the appeal records at p. 376) has expressly provided that the respondent can terminate for breach of 'any term' of the contract and that included Clause 7.1 (Vol. 3 of the appeal records at p. 371) which provides that 'payments will be made to the contractor before the 10th working day of the following month.' Counsel therefore contended that it is irrelevant to consider the question whether the term for payment is a condition or a warranty because the parties have expressly provided for the consequence and that was the expression of their intention to which the learned Judge had rightly given effect.

Counsel also submitted that time was of the essence in this case because of Clause 19 and also the nature of the contract the surrounding circumstances of which indicate that time for payment was of the essence because of two relevant factors namely (i) the term for payment was reduced from 15 days in the 1st contract to 10 days in the subsequent contracts; (ii) the respondent was dependent on those payments to pay his creditors and his workers who have to be paid by the 7th day of the month. Mr. Sethu distinguished *Tan Ah Kian's* case (*supra*) and pointed out that there was no provision in the contract in that case for termination for any breach thereof. He also pointed out that in any case our Courts apply the same principles of law as in the United Kingdom and that a contract for work and labour does not stand on a different footing and that the evidence of surrounding circumstances could show that time was of the essence.

Mr. Sethu then pointed out that neither laches or acquiescence was pleaded or argued before the learned Judge in the High Court. He referred to s. 4 of the Limitation Act and pointed out that any defence under that Act cannot be considered unless pleaded. On waiver Counsel pointed out that in the Court below the appellant in its submission did not suggest in what sense it was using the term and in what sense it wanted the Judge to find on waiver. He submitted that the Judge considered waiver in the narrow sense and in the legal sense including estoppel. Mr. Sethu stated that waiver was not applicable in this case and contended that every time a breach of contract occurred there is a vested right of action which could only be satisfied by accord and satisfaction and referred to the following passage in the judgment of the U.K. Court of Appeal in *De Bussche v. Alt* [1877] 8 Ch D 286:

> When once the act is completed without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined on very different legal consideration. A right of action has then vested in him which, at all events as a general rule, cannot be divested without accord and satisfaction, or release under seal. Mere submission to the injury for any time short of the period limited by statute for the enforcement of the right

of action cannot take away such right, although under the name of laches it may afford a ground for refusing relief under some particular circumstances; and it is clear that even an express promise by the person injured that he would not take any legal proceedings to redress the injury done to him could not by itself constitute a bar to such proceedings for the promise would be without consideration, and therefore not binding.

Counsel contended that silence did not constitute waiver and pointed out that in each contract there was no mention of past liability. He also invited the Court to look at Clause 19.3 of the contract (Vol. 3 of the appeal records at p. 372) which provided that 'any termination or prior determination of this agreement shall be without prejudice to any claim or action either party may have against the other in respect of any antecedent breach of the terms mentioned herein.' Mr. Sethu also stated that waiver requires an intention to forego a claim and the learned Judge had accepted the evidence of Mr. Ong (PW1), the Chief Executive of the respondent, that it had not intended to abandon its claim. Counsel also stated that even if a contract had expired, nevertheless the right to claim damages was not lost, and submitted that waiver is essentially a question of fact and referred to *Proctor and Gamble v. Peter Cremer* [1988] (3) All ER 843, 853.

Mr. Sethu then pointed out that the other meaning of waiver is estoppel. He submitted that there was no plea in the defence based on the exchange of correspondence nor was it raised in the Court below either in the submission or cross-examination of the respondent's witnesses. Counsel submitted that an estoppel requires an unequivocal and unambiguous representation that the respondent was abandoning or would forebear to make any claim, and pointed out that there was no such representation in any of the letters relied on by the appellant and there was no mention that the respondent was abandoning its claim for damages. Moreover there was no evidence of any reliance or detriment which are essential for estoppel as pointed out Robert Goff J in *Societe Italo-Belge v. Palm and Vegetable Oils (Malaysia) Sdn. Bhd.* [1982] 1 All ER 19, 25, 26 and the learned Judge had expressly found that there was no such reliance.

Counsel then pointed out that the appellant did not submit on election before the trial Judge and contended that it was not open to the appellant to raise it now before this Court. He submitted that a breach of contract entitles the innocent party either to terminate it and claim damages or to affirm the contract and claim damages; either way the right to damages is not affected. Affirmation only deprives the remedy of termination, and the right to damages for a breach of contract is a common law remedy unaffected by any equitable consideration. He submitted that in any case Clause 19.3 of the contract (Vol. 3 of the appeal records at p. 377) expressly preserves the right to claim damages.

On wrongful deductions Mr. Sethu stated that the respondent's challenge relates to the propriety of the deductions. The respondent alleged that deductions had been made for machines he did not use and there were deductions made for machines used by the appellant for its own purposes and the charges are exorbitant.

On the issue of remoteness of damage, Mr. Murthi, the other Counsel for the respondent, pointed out that the appellant did not either in its pleadings, cross-examination or submission raise the question of remoteness. Thus on the question of loss of profits there was no evidence in rebuttal. He pointed out that documents in this case were filed one year before trial and no particulars and proper discovery were sought before it. On the evidence in rebuttal by the appellant Mr. Murthi pointed out that there was no other evidence except that of the Assistant Registrar of Companies (DW3) who stated that from 1982 onwards no accounts have been filed by the respondent. He then referred to the relevant passages in the grounds

of judgment and pointed out that the learned Judge had gone through the respondent's claim one by one. He also pointed that the learned Judge had addressed his mind on the remoteness of certain claims and had rejected some of them as being too remote. Counsel then stated that the stand of the appellant in the Court below was that the respondent was either entitled to all its claims or to nothing at all. It never challenged any particular claim. He referred the Court to the pleadings and stated that new points have now been taken in the Supreme Court and contended that the question of remoteness of damages does not therefore arise.

On the complaint of the appellant there was lack of proof especially for the loss of profits, Counsel drew attention to the point made by the learned Judge that there was no question of audited accounts being required for the period when the respondent was not operating the business any more. Counsel pointed out that Mr. Ong had given evidence for the respondent that loss of profits was a percentage of the contract sum and sufficiency of the proof of damage was a matter for the trial Judge. The appellant in the Court below did not dispute the respondent's mode of assessment of loss of profits. He contended that in the absence of any challenge the learned Judge had rightly accepted and acted on the evidence of the respondent.

On the question of deduction of income tax, it was the respondent's submission that the appellant having failed to raise that plea before the trial Judge, it could not now be permitted to raise it for the first time in this Court. He contended that it would involve evidence as to whether the respondent would be under a liability to pay tax.

In his reply, Mr. Sri Ram reiterated that notice was not given to make time of the essence. He submitted that an intention to make time of the essence of the contract must be expressed in unmistakable language or may be inferred from what passed between the parties before but not after the contract was made. In support of that contention, he referred to the following passage in the judgment of Lord Wilberforce in *Wickman Tools v. Schuler A.G.* [1974] AC 235, 261:

> In my opinion, subsequent actions ought not to have been taken into account. The general rule is that extrinsic evidence is not admissible for the construction of a written contract; the parties' intentions must be ascertained, on legal principles of construction from the words they have used. It is one and the same principle which excludes evidence of statements, or actions, during negotiations, at the time of the contract, or subsequent to the contract, any of which to the lay mind might at first sight seem to be proper to receive. As to statements during negotiations this House has affirmed the rule of exclusion in *Prenn v. Simmonds* [1971] 1 WLR 1381 as to subsequent actions (unless evidencing a new agreement or as the basis of an estoppel) in *Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.* [1970] AC 583.

Counsel also contended that the law makes no distinction as to the rights of parties whether there is an express right of termination or not and relied on the Australian case of *Sargent v. A.S.L. Developments Ltd.* [1974] 131, CLR 634, 655.

On waiver Mr. Sri Ram's reply was that it has been expressly pleaded in the statement of defence. He contended that the expression used is not material and that it may be called acquiescence, laches, waiver, affirmation or estoppel and that they are all species of a common genus. He stated that he relied heavily on *Habib Bank Ltd. v. Habib A.G.* [1981] 1 WLR 1265, 1283-1285.

Counsel pointed out that the respondent had asked for successive contracts and contended that it was reasonable for the appellant to infer that the respondent had waived its rights. He then contended that English Common Law in the cases quoted by the respondent is

materially different from our law which is found in s. 64 of the Contracts Act 1950. He then referred to *Chuna Mal-Ram Nath v. Mool Chand-Ram Bhagat* LR 55 IA 154 which was a decision under s. 63 of the Indian Contracts Act 1872 (similar to s. 64 of our Contracts Act 1950) in which the Privy Council held that a promise can effectually dispense with performance of a contract, in whole or in part without either an agreement by the promisor, or consideration for the dispensation.

Mr. Sri Ram also submitted that as the learned Judge had misdirected himself on the law of waiver, it was necessary to point out the difference between waiver at common law in the sense quoted by the learned Judge from Chitty on Contracts and waiver in the identical sense under our law, that is, s. 64 of the Contracts Act. Counsel also submitted that what has to be borne in the forefront of one's mind is that any given stipulation in a contract or a breach of any stipulation may be waived by either party in the sense advanced by the appellant.

In answer to the contention of the respondent that the taxation point was not raised before the High Court, it was the contention of Mr. Sri Ram that taxation is a necessary incidence in the assessment of damages which every Court undertaking such a task is by law enjoined to take into account. He pointed out that in the *Daishowa's* case (*supra*) the trial Court did not take tax into account but that did not prevent the Federal Court from dealing with an essential ingredient.

Whether or not time is of the essence of a contract must depend on the facts and circumstances of each case. Intention of the parties gathered from the instrument itself together with the surrounding circumstances must be looked at. In this case having perused the relevant contract and construed it as a whole and Clauses 7.1 and 19.2 therein in particular, we considered that time was of the essence of the said contract. We agreed with Mr. Sethu that not only the said provisions of the contract but also the nature of the contract, its subject matter and the surrounding circumstances showed that payment and therefore time was of the essence. The respondent in this case was entitled to terminate the extended third contract because of the appellant's persistent delays in making payments to the respondent in accordance with Clause 7.1 of the said contract. There was therefore no wrongful repudiation of the said contract for breach of a stipulation which, applying the tests suggested by Lord Justice Sellers and Lord Justice Upjohn in the *Hongkong Fir Shipping* case (*supra*), we considered was the intention of the parties by necessary implication to be regarded as a condition which goes to the root of the contract. In any case we also agreed with Mr. Sethu that whether the stipulation concerned was a condition or not did not matter because the parties have expressly provided for the consequences of a breach thereof and the learned Judge had given effect to the parties intention.

The word 'waiver' is used in the English Common Law in a variety of a different senses. As pointed out by the respondent, it was unfortunate that the appellant, as the defendant, had not submitted to the trial Judge in what sense the word was pleaded and used. We agreed with Mr. Sri Ram that s. 64 of our Contracts Act 1950, which was also not brought to the attention of the learned Judge, represents a departure from the Common Law in England. Our law on waiver in s. 64 of the Contracts Act 1950, is similar to the Indian Law on the general principles of waiver under which it is open to a promisee to dispense with or remit wholly or in part the performance of the promise made to him or he can accept any promise which he thinks fit. Under our law neither consideration nor an agreement will be necessary. In this case we also agreed with the respondent that it had not been shown to the trial Judge or to us that the respondent had intentionally foregone its claims. On the other hand

the learned Judge who saw and heard Mr. Ong in the witness box accepted his evidence that the respondent did not intend to abandon its claims under the various contracts. We therefore agreed with the learned Judge that as a matter of fact waiver did not apply in this case.

Estoppel in any special form especially by conduct or by representation was not specifically pleaded in the statement of defence as the appellant should have done so under O. 18 r. 8(1) of the Rules of the High Court 1980, because it is a material fact which would take the opposite party by surprise and raise issues of fact. As a result it was not raised in the Court below either in the submissions by Counsel or cross-examination of the respondent's witnesses. In any case there was no evidence of any clear and unequivocal representation by the respondent in the correspondence or orally that it was abandoning its claims for damages. Nor was there evidence that the appellant had believed and relied on such representation and had acted to his damage upon such belief thus created. The learned Judge had also expressly found on the evidence that there was no such reliance. The appellant could not have relied on estoppel or any such issues not raised in the lower Court and could not now therefore raise them at the appellate stage.

Although the appellant did not raise as a positive allegation the question of remoteness of damage in respect of all or some of the respondent's claims, yet it has pleaded in para. 23 of the statement of defence that 'save and except as herein admitted, the defendant denies each and every allegation in the statement of claim as if traversed seriatim'. Although the prevailing and better practice is for the defendant to deal specifically with the claim for damages, yet there is no obligation on the appellant, as defendant, to plead to the allegations as to damages, because by O. 18 r. 13(4) 'any allegation that a party has suffered damage and any allegations as to the amount of damages is deemed to be traversed unless specifically admitted.'

Therefore although remoteness of damage was not raised in cross-examination or during submissions before the trial Court, we considered that it can be raised and argued before us for our consideration whether all or some of the respondent's claims for damages were too remote. We must of course bear in mind that the respondent had no opportunity to lead evidence in rebuttal and also, as pointed out by Mr. Murthi, that the appellant never sought for any particulars or discovery. We have, like the learned Judge, gone through the various claims of the respondent against the appellant in its statement of claim, and consider that on the evidence as well as the learned Judge's findings they should all be allowed except those stated in sub-paragraphs (viii) and (ix) of para. 25A therein because the alleged loss of RM301,682.53 in respect of termination and retrenchment payment and benefits paid to employees and the payments of RM7,968,452.80 to the leasing company for repossession of the machines were too remote and have no nexus to the termination of the contract in question. Those two awards were wrongly made. The special damages awarded are therefore reduced to RM7,882,210.14. As for the award of general damages of RM6,000,000 we also agreed with the appellant that the award was wrong as the respondent was not the owner of the machines and was merely the lessee. It was entitled to the use and possession of those machines provided that rent was paid. We also agreed that as the respondent was not the owner of those machines it could not claim for the loss of the value of those goods in respect of which it had no title. That award of RM6,000,000 is also therefore set aside.

As regards the tax element it is impossible to assess the reduction to be made for taxation without any or sufficient evidence. Had there been a deduction for tax the amount awarded would of course be less, and following *Daishowa's* case the amount of damages awarded

would have been reduced further. However, as pointed out by Mr. Murthi, the question of deduction of income tax was not raised at all before the trial Judge and there is no evidence adduced by either party as to the liability of the respondent to pay tax or the amount of its tax liability. In the circumstances of this case we would therefore decline to make any further deductions for tax.

The decision of the High Court on liability against the appellant and its dismissal of the counter-claim are affirmed but the appeal against the quantum of damages is allowed to the extent indicated above. The respondent is still entitled to interest as ordered by the High Court on the amount of damages as reduced as from the date of notice of termination of contract, that is, on 28 August 1985. As for costs, the appellant shall pay half of the respondent's costs here and in the Court below.

Also found at [1990] 2 CLJ 913